Filed 8/27/19 In re J.S. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re J.S., a Person Coming Under the Juvenile Court Law.	B290356, B293966, B295432
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK99082C)

APPEALS from orders of the Superior Court of Los Angeles County, Natalie Stone, Judge. Reversed and remanded with directions.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Minor.

Takin Khorram for De Facto Parents.

In his three consolidated appeals D.M. (father) challenges the orders of the juvenile court (1) terminating his reunification services, (2) denying his request to place his son J.S. with paternal aunt, (3) denying his petition for modification, (4) terminating his parental rights, and (5) finding that this case did not fall under the Indian Child Welfare Act (ICWA)). We discern no error apart from the ICWA finding. Accordingly, we reverse the order terminating parental rights for the limited purpose of enabling the court to determine compliance with ICWA.

BACKGROUND

I. The adjudication and disposition—late 2015

The Department of Children and Family Services (DCFS) detained J.S. in September 2015 when he was 11 months old. The ensuing petition alleged domestic violence between mother

and father.[1] (Welf. & Inst. Code, § 300, subd. (b)(1).)[2] Mother described father as having "a terrible problem with anger management." Father appeared in juvenile court in custody for hitting mother and at his request, the court ordered DCFS to assess paternal aunt as a visitation monitor.

J.S. was placed in foster care while DCFS worked with some relatives to arrange for placement. Those relatives interested in taking the child had disqualifying criminal records and had not provided DCFS the necessary paperwork for waivers.

Father disappeared for a month following his release from custody. He appeared at a hearing in November 2015, and gave his contact information to the court. Father then missed the scheduled adjudication hearings in January, February, and March 2016.

The juvenile court sustained the petition in March 2016 in father's absence. At the disposition hearing in June 2016, the court declared J.S. a dependent and removed him from his parents' custody (§ 361, subd. (c)). Father was present and heard the court order him to complete a 52-week domestic violence program, a parenting class, to undergo individual counseling to address case issues, including anger management, and to visit J.S. twice a week for three hours with a monitor.

In August 2016, J.S. was placed with foster parents.

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[1] Neither mother nor J.S.'s two older siblings is a party to this appeal.

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

II. The reunification period—June 2016 to June 2017

The reunification period was marked by father's disappearance and DCFS's perpetual attempts to locate him. Father could not be found after the disposition hearing. The juvenile court continued the six-month review hearing (§ 366.21, subd. (e)) five times to allow DCFS to locate him. DCFS sent notices of all hearings to the addresses discovered in its due diligence searches for father, including an address in Pomona, and to father's court-appointed counsel.

On April 10, 2017, the social worker went to the address in Pomona where he learned from the homeowner that father did not live there.

Father appeared at a scheduled hearing on April 24, 2017. At the juvenile court's direction, father reported that he was living in San Bernardino, a city not disclosed in the due diligence searches. He was in the process of completing domestic violence prevention and parenting components of his case plan. Father did not keep his promise to meet with the social worker to obtain resources in San Bernardino.

In advance of the 12-month review hearing, DCFS reported that father had completed half of his domestic violence course and attended one of six parenting sessions. Father agreed to contact the foster family agency to arrange visits with J.S., but he expressed his desire that J.S. be placed with paternal aunt so that he would have "easier access" to the child. DCFS recommended reunification be terminated, reasoning that father had not complied with his case plan. The case was already at the 18-month drop-dead date and so father had "run out of time."

Father appeared at the 12-month review hearing (§ 366.21, subd. (f)) on June 21, 2017. The juvenile court found that he was

only in partial compliance with his case plan. However, because DCFS had confused father with another child's father whose name is phonetically similar, the court continued the reunification period to September 18, 2017, the 24-month mark (§ 366.22).

III. Extended reunification

In its report for the section 366.22 hearing, DCFS stated that father had not completed his classes and did not seem interested in maintaining contact with J.S. Also, DCFS had no way to assess father's ability to parent. Father had not seen the child since J.S.'s detention two years earlier, despite knowing how to reach the foster family agency and DCFS, and despite the juvenile court's reminder at the previous hearing to visit the child. The court continued the hearing to December 2017, three months beyond the maximum 24-month period for reunification.

The foster parents petitioned to be given de facto parent status in mid-October 2017. They explained that after 14 months in their care, J.S. was very much attached to their family and they were to him. Early on they had arranged with the regional center to address his expressive language skills. He only grunted. Also, J.S. threw tantrums, was aggressive, had difficulty sitting and attending to activities, and had mild hearing loss. J.S. had benefitted from occupational and sensory therapy and the family had all learned how to manage his behaviors. The foster parents also arranged for an individual education plan for the child. DCFS had no objection to the foster parents becoming de facto parents.

At a hearing on October 18, 2017, at DCFS's request, his attorney put the Pomona address on the record as father's mailing address. The juvenile court ordered DCFS to meet with

father and paternal aunt to arrange a written visitation schedule within ten days. However, DCFS was unable to reach father for a month, despite calling almost daily.

On October 31, 2017, the social worker went to the Pomona address looking for father and discovered that it was paternal aunt's residence. *Paternal aunt signed an affidavit stating that father did not live there.*

Father finally called the social worker on November 27, 2017 to ask to visit J.S. at the same time as paternal aunt did. Despite the arrangement, father did not appear for the next visit between paternal aunt and J.S., just a week later. In its ensuing report, DCFS related that father had not visited J.S. at all. Also, father did not complete his domestic violence course.

At the 24-month review hearing held on December 14, 2017 (§ 366.22), 27 months after J.S. was detained, father's attorney admitted she was unable to locate him and could not contest DCFS's recommendation to terminate reunification services. The juvenile court found father's participation in court ordered services and progress toward alleviating the causes of the dependency were "nonexistent," as he had neither visited nor completed his domestic violence course. The court terminated reunification for father and set the hearing under section 366.26 to select a permanent plan for J.S. The court also granted the foster parents' request for de facto parent status.

IV. The section 361.3 placement trial

In March 2018, the de facto parents filed a petition for modification (§ 388) seeking to prevent removal of J.S. from them absent an emergency. The petition explained that as a special needs child, J.S.'s behavior had regressed significantly because of the loss of stability since visits began with paternal aunt. The

child's special education teacher noted more impulsivity in J.S. and a slight increase in "physicality" with his peers. DCFS recommended that J.S. be placed with paternal aunt upon receipt of resource family approval, which was given.

At the placement trial, DCFS and counsel for J.S. wanted the child to be placed with paternal aunt. After extensive argument, the juvenile court granted the de facto parents' petition for modification in part by ordering that J.S. not be moved from the defacto parents' custody absent court order or emergency. Father filed his first appeal (B290356).

V. Father's section 388 petition to reinstate reunification and the order terminating parental rights

Father filed a petition for modification (§ 388) in July 2018 seeking reinstatement of reunification services. He attached documentation showing that he had completed 49 out of 52 domestic violence classes. Noting father had provided no verification that he had completed individual counseling, and that he had only just begun visiting J.S., DCFS recommended against granting the modification petition. After hearing on November 9, 2018, the juvenile court denied father's section 388 motion.

Turning to permanency planning (§ 366.26), the juvenile court found by clear and convincing evidence that J.S. was adoptable. It terminated father's parental rights and designated the foster parents as prospective adoptive parents. The court stayed the termination order pending a meeting to arrange sibling visitation. Father filed his second appeal (B293966). After the court lifted the stay, father filed his third appeal (B295432). We consolidated the appeals.

Additional facts will be included below in connection with

the relevant legal discussion.

DISCUSSION

I. No appellate review of the order terminating reunification services

We are unable to consider father's contention that DCFS failed to provide him with reasonable services.

Whenever a juvenile court terminates reunification and sets the hearing to select a permanent plan under section 366.26, it must "advise all parties" that those wishing to preserve any right to review on appeal of the order setting the section 366.26 hearing must seek an extraordinary writ by filing a notice of intent to file a writ petition. (Cal. Rules of Court, rule 5.590(b).) An order setting a section 366.26 hearing "is not appealable at any time" unless a petition for extraordinary writ review is timely filed. (§ 366.26, subds. (*l*)(1)(A) & (*l*)(2); Cal. Rules of Court, rules 8.450, 8.452, & 8.403(b)(1).)

This prohibition against review of late claims of error at the setting hearing does not apply when notice of the writ review requirement was not given. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 838–839.) The juvenile court has the duty to give oral notice to those present in court, and written notice to those absent by first-class mail "to the last known address of the party." (Cal. Rules of Court, rule 5.590(b)(1) & (2); § 366.26, subd. (*l*)(3(A)(i)-(ii).) Father did not appear at the setting hearing but admits that his attorney did and that the court clerk mailed the writ advisement to his counsel. Father argues notice was deficient because the court did not send the advisement to his last known address in Pomona.

The juvenile court properly determined that Pomona was *not* father's last known address or the address where father

would most likely receive the writ notice. First, although father's attorney put the Pomona address on the record as father's mailing address on October 18, 2017, just 13 days *later*, paternal aunt *executed an affidavit* stating that father *did not live there*. In fact, that was the second time in 2017 that a resident at that location told DCFS father did not live at the Pomona address. Second, over the course of this dependency, DCFS sent numerous notices to Pomona and yet father did not appear at most of the hearings in this dependency or respond to attempts to reach him in Pomona. Third, father did not go to paternal aunt's house even when the child was there. Fourth, father told the social worker that he lived in *San Bernardino* where he was working and attending domestic violence classes. Finally, at the setting hearing, the court *specifically raised the question of father's address for purposes of mailing the writ advisement*, noting that father had named the Pomona address, "but that it turns out that's the aunt's address." His attorney explained that she had "no recent contact with the father" and indicated the Pomona address was "the best I can do." The court responded, "But that's the aunt's address who *signed an affidavit saying he doesn't live there*." (Italics added.) Under the circumstances, the court complied with California Rules of Court, rule 5.590(b)(2) by mailing notice to father's attorney.

In fact, mailing the writ notices to the Pomona address would have been deficient. The court in *In re A.A.* (2016) 243 Cal.App.4th 1220, at pages 1240 and 1242, held notice was defective where the social services agency mailed it to "literally the 'last known address' on file," despite *knowing* it was not the mother's address and that the mother was not likely to receive it there. Here, DCFS knew that Pomona was *not* father's last

known address and that he was not likely to receive notices there. As father failed to keep DCFS apprised of his current address—or even his whereabouts—the juvenile court astutely ordered notice be given to the place father would most likely receive it: father's attorney, who had declared in October 2017 that father answered counsel's telephone calls even when DCFS had trouble reaching him. Father does not otherwise contend he was denied notice. He does not argue his attorney did not receive notice or that counsel failed to give him notice. Father's failure to timely seek extraordinary writ review of the setting hearing precludes him from now challenging the adequacy of reunification services.

II. No standing to challenge placement

Father contends that the juvenile court erred in failing to place J.S. with paternal aunt.[3] The juvenile court terminated father's reunification services on December 14, 2017, after having given father more than 24 months' time to reunify. It made the placement ruling five months later, on May 23, 2018. Father lacks standing to seek appellate review of the juvenile court's order denying the request for placement of J.S. with paternal aunt because father's interests are not prejudiced by this order.

Only a party aggrieved by the judgment has standing to appeal in juvenile dependency proceedings. (*In re Lauren P.* (1996) 44 Cal.App.4th 763, 768.) "To be aggrieved, a party must

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[3] Among the deficiencies in reunification services that father seeks to challenge by way of appeal is the failure to place J.S. with paternal aunt. As noted, father did not timely seek extraordinary writ review of reunification services and so he cannot be heard to challenge placement as a service.

have a legally cognizable immediate and substantial interest which is injuriously affected by the court's decision. A nominal interest or remote consequence of the ruling does not satisfy this requirement." (*In re Carissa G.* (1999) 76 Cal.App.4th 731, 734; accord, *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034.)

Father's interest in this dependency was to reunify with his child. (*In re Vanessa Z.* (1994) 23 Cal.App.4th 258, 261.) The court's decision not to place J.S. with paternal aunt, made after its order terminating father's reunification services therefore, does not adversely affect that interest.[4] (*Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th at p. 1035.) Paternal aunt's separate interest in her relationship with J.S., her nephew, is legally protected in section 361.3, which confers upon a relative the right to preferential consideration for placement. Paternal aunt did not file a notice of appeal. Likewise, "a child normally has standing to appeal a juvenile dependency judgment." (*In re Crystal J.* (2001) 92 Cal.App.4th 186, 189.) But, J.S. did not file a notice of appeal.[5] Father is the only appellant in this case. "An

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[4] Father mischaracterizes the record when he argues that the juvenile court erred by "sua sponte" (italics omitted) continuing the placement hearing until after his reunification services terminated so as to shift the burden to DCFS and eliminate the preference for parental placement. The court did not voluntarily continue the hearing. *J.S.'s attorney* asked the court *after* it had terminated father's reunification to set the placement hearing "*in a couple . . . months time*" (italics added) to enable the court to fully understand the relationship between J.S. and paternal aunt.

[5] Counsel for J.S. filed a lengthy *respondent's* brief that challenges the juvenile court's placement ruling. We have no

appellant cannot urge errors which affect only another party who does not appeal." (*In re Vanessa Z.*, *supra*, 23 Cal.App.4th at p. 261.) This court is without jurisdiction to consider father's contention.

Father argues that had the juvenile court placed J.S. with paternal aunt earlier, he would have been able to visit and bond with the child. The argument is unavailing. Father could always have visited J.S. through the foster family agency. He always knew how to reach DCFS; and as of early 2017, he knew the agency's phone number. But he never contacted either. More important, father never visited J.S. during the extended reunification period at all, even when the child was with paternal aunt, despite DCFS's attempts to reach him and to arrange visits for him. Therefore, any prejudicial impact on father's interest by failing to place the child with paternal aunt sooner in this dependency is purely speculative. The interest affected by the order that father seeks to challenge at this point in the proceedings is that of paternal aunt or J.S., neither of whom appealed. (*Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th at pp. 1034–1035.)

III. No abuse of discretion in denying father's petition for modification

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a

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power to entertain the child's assignments of juvenile court error in his respondent's brief where he did not file a notice of appeal. (See § 395; Code Civ. Proc., § 906; cf. *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 952 [failure to file notice of appeal fatal to appeal not curable by writ petition].)

preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a ' "legitimate change of circumstances" ' and that undoing the prior order would be in the best interest of the child. [Citation.] The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion." (*In re S.J.* (2008) 167 Cal.App.4th 953, 959–960.) "An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination." (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.)

However, "[n]ot every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances . . . must be of such significant nature that it requires a setting aside or modification of the challenged order." (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.)

Father did not carry his burden to show a change in circumstances. Domestic violence and father's "terrible problem with anger" were the cause of J.S.'s dependency. The juvenile court created a two-pronged plan to resolve the problem: it ordered father to complete 52 weeks of domestic violence classes and to undergo individual therapy to address anger management. Father did not complete domestic violence classes and did not

even commence the counseling portion of his service plan. He testified that he had only been to an initial intake session but had not yet been evaluated or begun counseling itself.[6]

Apart from failing to carry his burden to show a change in circumstances, father did not demonstrate that resumption of services at this late date would be in J.S.'s best interest. Father's section 388 petition came seven months after reunification services were terminated. "[A]fter reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability." (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) On the eve of the section 366.26 permanency planning hearing, the child's interest in stability is the court's foremost concern and outweighs any interest in reunification. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) "In fact, there is a rebuttable presumption that continued foster care is in the best interest of the child [citation]; such presumption obviously applies with even greater strength when the permanent plan is adoption rather than foster care." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) Three years after J.S. was detained from his custody, father only lately began visits, which remain supervised. In October 2018, according to his de facto mother, J.S. threw tantrums and refused to follow directions after visits with father. Where father has not complied with his case plan, only began to address the cause of

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[6] The certificate of completion of his parenting skills education included counseling as a component. But that counseling was only to "develop[ ] the skills necessary to carry out his obligations to his children to the best of his ability." The attached progress report shows that father did not undergo individual counseling or address anger management.

the dependency in a domestic violence program and counseling, and failed to regularly visit J.S., the prospect of additional reunification to see whether father can parent, does not promote stability for J.S. and hence would not be in the child's best interest. The juvenile court did not abuse its discretion in denying father's petition under section 388.

IV. Father made no showing of error in the order terminating his parental rights.

Father argues that if we reverse the order denying his petition for modification, we must reverse the order terminating his parental rights. We do not reverse the order denying father's section 388 petition.

V. Limited reversal to comply with ICWA (25 U.S.C. § 1901, et seq.)

Father contends the juvenile court erred in finding that ICWA did not apply because DCFS failed to provide the court with the required documentation. A non-Indian parent whose parental rights have been terminated has standing to assert ICWA notice violations on appeal. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.)

Upon receiving information of a claim of Indian heritage, the juvenile court and DCFS must inquire into the parents' tribal connection and ancestry. DCFS must notify any federally recognized tribe of the dependency and of all known information about the family. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.) To determine whether ICWA notice requirements have been satisfied, the juvenile court must have sufficient facts from DCFS about (1) the parents' claims, (2) the extent of DCFS's inquiry, (3) the results of the inquiry, (4) the notice provided any tribes, and (5) the tribes' responses. (*Ibid.*) Without these facts, the

juvenile court cannot determine, explicitly or implicitly, whether ICWA applies. (*Ibid*.)

Here, at the detention hearing, the juvenile court noted it already found during the 2013 dependency of mother's other children that mother did not have Cherokee ancestry and ICWA did not apply. Father denied Indian ancestry and so the court found in September 2015 that ICWA did not apply to J.S. Shortly thereafter, mother's attorney informed the court that J.S.'s maternal grandfather clarified that the family had Choctaw heritage through the maternal great-great grandmother. The court ordered DCFS to investigate further and give notice to the Choctaw and Cherokee tribes.

DCFS notified the tribes and informed the juvenile court of the results. Although DCFS stated it received responses from two tribes indicating the child was not a member, the responses themselves are not in the record. DCFS also reported that it had not heard from a third tribe. The court found it had no reason to believe J.S. was an Indian child and ruled that ICWA did not apply.

Father does not contend that DCFS omitted to notify the tribes as required by ICWA. He observes that the record contains only the letter responses from the Mississippi Band of Choctaw Indians and the Cherokee Nation. DCFS concedes it failed to submit to the juvenile court copies of the ICWA notices or the certified mail or signed green-card receipts, or any other responses from tribes. DCFS recognizes therefore, that the court was unable to evaluate the extent and results of the inquiry, or the quality of the notices provided to the tribes, and could not make a final determination whether ICWA applied. Limited remand is necessary to enable the juvenile court to determine

whether DCFS has provided proper notice under ICWA. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1203.)

DISPOSITION

The order terminating father's parental rights is reversed for the limited purpose of complying with ICWA. The case is remanded to the juvenile court with directions to order DCFS to submit to the court all ICWA notices it sent and all receipts and responses received. Once the juvenile court finds that there has been substantial compliance with the notice requirements of ICWA, it shall make a finding with respect to whether J.S. is an Indian child. If, after proper inquiry and notice, the juvenile court finds that J.S. is an Indian child, the court shall proceed in conformity with ICWA. If, however, after proper inquiry and notice, the juvenile court finds that J.S. is not an Indian child, the order terminating father's parental rights and selecting adoption as the permanent plan shall be reinstated.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.